

Avoidance of Judgment Lien
Costs of hypothetical sale

In re William and Denise James, Case No. 02-66620-fra13

2/12/2003 FRA

Unpublished

Debtors filed a motion to avoid a creditor's judgment lien under Code § 522(f), as it allegedly impaired Debtors' homestead exemption. Relying on state law, Debtors argued that the costs of a hypothetical sale of the property should be added to the claimed exemption to determine whether the exemption is impaired by the judgment lien. ORS 23.280 provides a mechanism whereby a judgment debtor who wishes to sell homestead property can have the value of the property and prior liens determined, and discharge the judgment lien on the proceeds of sale in an amount by which the lien exceeds the value of the property less the homestead exemption and prior liens. Case law holds that the costs of sale must be first deducted from the proceeds before the homestead exemption amount is applied.

The bankruptcy court noted that ORS 23.280 only applies when the debtor has executed an agreement to transfer ownership of the homestead property. In the present bankruptcy case, the Debtors intend to keep the property. The court held that it should evaluate the property and the exemption in light of the Debtors' proposed use of the property. Since no sale is contemplated, calculation of the amount by which the homestead exemption is impaired should not take into account the costs of such a sale.

E03-1(6)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
)
WILLIAM AND DENISE JAMES,) 602-66620-fra13
)
Debtors.) MEMORANDUM OPINION
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An adjourned confirmation hearing was held on January 23, 2003 at which evidence was taken regarding the value of Debtors' homestead and whether, and to what extent, Debtors can avoid the lien of Valley Equipment Rental, Inc. The matter was taken under advisement at the conclusion of the hearing. The purpose of this opinion is to announce the ruling of the court.

I. BACKGROUND

Debtors filed their petition for relief under Chapter 13 of the Bankruptcy Code on August 30, 2002. With their petition, they filed a proposed Plan of Reorganization which provided for fifty monthly payments to the trustee of \$250. From this payment

the trustee is to pay the Debtors' attorneys fees, and a \$439.00 property tax arrearage. Ongoing payments to two secured creditors will be made directly to such creditors. The plan estimates a 10% dividend to unsecured creditors. At trial it was disclosed that an account receivable of approximately \$5,000 had not been included in the Debtors' schedules. The account was paid in full after the petition for relief was filed, and the proceeds spent by the Debtors on living expenses. The Debtors and the Trustee agree that the account is property of the estate, and that amount in question must be included in calculating the minimum amount to be paid under the "best interest test" set out in Code §1325(a)(4). The plan set the value of the homestead at \$110,000.

Valley Equipment Rental, Inc. has filed a proof of claim asserting a secured claim in the sum of \$19,367.64. The basis of the claim is a pre-petition judgment entered by the Circuit Court for Jackson County, Oregon. Under Oregon law, the judgment constitutes a lien on all real property owned by the Debtors in Jackson County, which includes their residence in Medford. The proof of claim has not been objected to, and must be deemed to be allowed. 11 U.S.C. §502(a). The proposed plan makes no provision for the claim. Instead, Debtors move to avoid the lien under Code §522(f)(1)(A), asserting that the judgment lien impairs their homestead exemption granted by ORS 23.240.

The matter was heard in Medford on January 23, 2003. At the hearing, Debtors presented testimony that the value of their home is \$105,000. The following day the court received a notice of modified plan, dated the day before the hearing, setting out the new value, and increasing the periodic payment attributable to the home from \$100 to \$250 per month. The amount to be paid to satisfy the best interest of creditors' test was changed from \$2,500 to \$5,000.

Finally, the court received on January 30 an objection from Pawnee Leasing, Inc. to provisions in the modified plan regarding property in which Pawnee claims an interest. These plan provisions were identical to those contained in the original plan.

II. DISCUSSION

1. Lien Avoidance

The Court must resolve two questions respecting the motion to avoid the judgment lien, one factual, one legal. The first is the actual value of the Debtors' residence. The second is whether Oregon law requires that the hypothetical costs of sale of a homestead be added to the statutory exemption.

Under Code §522(f), a judgment lien may be avoided to the extent it impairs an exemption under state law. To analyze motions seeking to avoid a lien, the court ascertains the value of the property, and deducts the value of any senior lien or

mortgage and the value of the exemption. If the resulting difference is less than the amount secured by the lien, the lien is avoided to the extent of the excess. See In re Hanger, 217 B.R. 592 (BAP 9th Cir. 1997), aff'd, 196 F.3d 1292 (9th Cir. 1999). If the result is zero or less, the lien is avoided in its entirety.

Value: In their schedules, Debtors disclosed their ownership of a home in Medford, and gave a value of \$110,000. At trial their appraiser testified that the value is \$105,000. The creditor's appraiser testified that the value is \$110,000. Both appraisers indicated that the values they found took into account the relatively poor condition of the house. The creditor's appraiser stated that the market for homes in this area and price range was brisk, and that he believed that the home could sell for as much as \$130,000 if painted and cleaned up for marketing. He did not, however, state in detail what had to be done, or what it would cost.

There is little basis for distinguishing between the two appraisals. One notable difference between the two is that the sales used for comparison by the one appraiser were generally closer to the subject property than those used by the other. However, all are in the same general neighborhood, and the Court has no reason to doubt that each appraiser used his best professional judgment in selecting sales for comparison. The

higher appraisal was prepared "as of " August 30, 2002, the petition date; the other is "as of" January 17, 2003. However, the testimony did not suggest that the market over the intervening four months had moved significantly in either direction.

While simply splitting the difference may seem unprincipled, it is reasonable to conclude that, where there is more than one reliable opinion available, the truth lies somewhere between them. For the purpose of this proceeding, I find the fair market value of the Debtors' residence as of the date of their petition for relief to be \$107,500. The amount owed and secured by senior liens was, on the date of the petition and plan, \$65,000. Adding the Debtors' claimed homestead exemption of \$22,561, ORS 23.240, there remains an equity of \$19,939. Since the claimed judgment lien is less than this amount, the motion to avoid the lien must be denied.

Relying on State ex rel. Nilson v. Jones, 33 Or. App. 581, 577 P.2d 541 (1978), Debtors argue that the amount credited to their statutory homestead exemption should also include the hypothetical costs of sale of the property. They presented evidence that such costs in this case would equal 7% of the sale price. This would reduce the value of the Valley Equipment lien by \$7,525.

ORS 23.280 provides a method whereby a judgment debtor who wishes to sell homestead property can have determined the value of the property and prior liens, and discharge the judgment lien on the proceeds of sale in the amount by which the lien exceeds the value of the property less the homestead and prior liens. This allows the property to be sold without having to pay the entire judgment. Nilson holds that the cost of sale must be first deducted from the proceeds before the homestead amount is applied. In effect, the amount protected from the lien is the sum of the homestead exemption and the cost of sale. Put another way, Oregon law does not require the judgment debtor to pay the costs of sale out of the exempt portion of the sale proceeds.

The state statute operates in the same manner, and has the same goal, as Code §522(f). However, ORS 23.280 applies only where the debtor has "execut[ed] an agreement to transfer the ownership of property in which a homestead exemption exists...." In this case, the opposite is true: the purpose of the Plan of Reorganization is to enable the Debtors to keep the residence. In the context of a motion to avoid a lien under Code §522(f), the court should evaluate the property and the exemption in light of the Debtor's proposed use of the property. See Associates Comm'l Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879 (1997) (Value of property, and amount of secured claim under 11 U.S.C. § 506(a), to be determined in light of the proposed use or

disposition of the property); See also In re Pepper, 210 B.R. 480 (Bankr. D. Col. 1997). As the Debtors intend to keep the residence, rather than sell it, ORS 23.280 and Nilson are not applicable in the context of debtors' motion under §522(f). Whether they might be in other contexts is not before me.

2. Confirmation of debtors' plan

Confirmation of the Debtors' Plan of Reorganization must be denied because Valley Rental's lien is not provided for. An order will be so entered, giving Debtors leave to file an amended Plan.¹

FRANK R. ALLEY, III
Bankruptcy Judge

¹Since it was not timely, and in light of the disposition of the pending plan, the objection of Pawnee Leasing will not be considered here.